Nos. 08-289 and 08-294

FILED
MAR 18 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, et al.,

Respondents.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS STATE OF ARIZONA AND ARIZONA STATE BOARD OF EDUCATION

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March 18, 2009

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INTRODUCTION

The State of Arizona and the Arizona State Board of Education (collectively "the State") are in the unusual position of being Respondents to Petitions for Certiorari filed by three of Arizona's elected officials. Those officials asked the lower courts to disregard certain requirements in Arizona law when examining the appropriateness of relief from a federal court order requiring compliance with the Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f) ("EEOA").

The state statute in question attempts to reduce or offset the State's funding obligations under the EEOA by taking into account federal funding received by some schools and districts. By doing so, the statute jeopardizes some $600 million per year in federal funding for all Arizona students. To preserve access to that funding for all Arizona's children, the State took the position below that relief from the judgment was not appropriate at this time, given the provisions of current state law.

The trial court correctly understood the important interplay between state and federal education funding when it determined that Arizona law, as currently in place, was not sufficient to comply with the court's prior judgment and denied Rule 60(b) relief. The court of appeals' opinion, while not without deficiencies, correctly affirmed the trial court's decision.

In this brief, the State addresses the standard for relief under Rule 60(b) and the relationship between the EEOA and the No Child Left Behind Act ("NCLB"). In addition, this brief attempts to give the Court a better understanding of the relationship between education funding options available to the State and its continued access to federal funding, since this relationship was crucial to the decisions below. Petitioners largely do not address these points or their role in the lower court decisions, necessitating a more complete discussion of the history of this litigation.

STATEMENT OF THE CASE

I. Procedural History of This Litigation Before the Rule 60 Motions.

a. Complaint and Judgment.

Plaintiffs, parents and students from the Nogales Unified School District ("NUSD"), filed this lawsuit in 1992, naming as Defendants the State of Arizona, the Arizona State Board of Education, and the Superintendent of Public Instruction for the State of Arizona (collectively, "the State Defendants"). Plaintiffs asked for declaratory relief regarding Arizona's alleged failure to comply with, among other things, its obligations under the EEOA to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (Joint Appendix ("JA") 1-18.)

In January 2000, the district court entered a declaratory judgment in favor of Plaintiffs on their EEOA claim, noting various deficiencies in the NUSD English Language Learner (ELL)[1] instructional program and concluding that the State funding for ELL instruction was arbitrary and capricious and bore no relation to the actual funding needed to meet the State's obligations under the EEOA. (Appendix to Intervenors' Petition in No. 08-294 ("Int. Pet. App.") 150a.)[2] The State Defendants did not appeal from that judgment.

b. Initial Post-Judgment Orders.

In October 2000, the district court ordered the State Defendants to conduct a cost study to determine the proper appropriation that would "effectively implement" its chosen instructional program for ELLs. (JA 37-39.) The district court ordered the State Defendants to comply with the January 2000 judgment by January 31, 2002. (JA 44-45.)

The State did not meet the court's deadline because intervening changes in state law altered the

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[1] At the time the decision was entered, English Language Learners were referred to as Limited English Proficient or "LEP" students.

[2] The court entered a post-judgment consent order governing the plaintiff's remaining claims. (JA 19; Clerk's Record ("CR") 213.) The State Defendants' compliance with that consent order has been the subject of various motions not relevant to the issues before this Court.

ELL programs whose cost was at issue. In November of 2000, Arizona's voters had passed an initiative that required English immersion and repealed the provisions of Arizona law that authorized school districts to use various models of instruction for students who cannot speak English. A.R.S. §§ 15-751(5), 15-752. As a result, the limited cost information available from the Arizona Department of Education's initial cost study completed in May 2001 did not address the actual cost of implementing the new model of English instruction that Arizona's voters had chosen. (CR 239.)

c. Enactment of Interim Legislation.

Lacking data regarding the costs of Arizona's new English immersion model, Arizona's Legislature enacted legislation in December 2001, designed to address the judgment on an interim basis while it continued to gather information. HB 2010, 2001 Ariz. Sess. Laws ch. 9 (CR 234). That legislation, HB 2010, substantially increased the per-student amount already provided for the ELL instruction and appropriated additional funds for teacher training, compensatory instruction, instructional materials, a literacy pilot program, and monitoring by the Arizona Department of Education. *Id.* HB 2010 also provided funding for a new cost study of ELL instruction, to be completed by August 2004, followed by committee recommendations based on the study in December 2004 for action by the Legislature in the 2005 legislative session. *Id.*

The Plaintiffs responded with a motion for injunctive relief, challenging HB 2010 as inadequate to satisfy the district court's order and characterizing the State's renewed effort to study costs as a stalling tactic. (CR 234.) The State Defendants opposed that motion, pointing to the substantial changes that had made it difficult to assess costs and citing the recent passage of the NCLB. (CR 239.) In light of those changes, the State Defendants contended that HB 2010's approach of increasing interim funding while completing the necessary study was rational and appropriate under the EEOA and the judgment. (*Id.*) The district court granted the Plaintiffs' request for injunctive relief, requiring the completion of a cost study by January 1, 2003 and extending the deadline for the State Defendants' compliance with the judgment to June 30, 2003. (JA 51-52.)

Given that both Arizona's new model of structured English immersion and NCLB would not be fully implemented until the 2002-03 school year, the State Defendants moved for reconsideration of the court's order accelerating the deadline for completion of the cost study. (CR 253.) After considering the motion, the district court entered an order finding that HB 2010 was an appropriate response to the judgment and its prior orders, particularly because the new funding was adopted "as an interim measure pending further study and review." (JA 54.) The district court therefore vacated its prior order, which had set a June 2003 deadline for compliance with the judgment. (*Id.*)

The State contracted with the National Conference of State Legislatures ("NCSL") to prepare the cost study, and, in August 2004, NCSL provided the Legislature with an executive summary and draft of the study. (CR 285.) The Plaintiffs responded with another request that the district court set a deadline for compliance with the January 2000 judgment. (CR 284.) The State Defendants opposed the motion, noting that HB 2010 contemplated that the Legislature would take action in response to the judgment in the 2005 legislative session and that the State remained on track to do so. (CR 285.) The district court rejected the State Defendants' arguments, stating that "the legislature has failed to meet the court's deadlines as well as their own" and expressing concern that ELL students would need to wait another year for relief if the Legislature were to adjourn without enacting legislation that complied with the judgment. (JA 392.) The district court therefore set a deadline of the later of April 30, 2005 or the end of the 2005 legislative session for the State to comply with the judgment. (*Id.*) As it had in its prior orders, the district court did not require enactment of any particular funding mechanism or instructional program, ordering only that the State defendants "comply with the court's January 2000 Order by appropriately and constitutionally funding the state's ELL programs." (*Id.*)

d. Post-Cost Study Legislation and Order Setting Deadline to Comply.

During the 2005 legislative session, the Arizona Legislature passed legislation establishing a system for funding ELL instruction to replace the interim funding provided by HB 2010. (CR 303.) The Governor vetoed that legislation, primarily because it relied on federal funding to fund the State's ELL instructional programs, which she feared would run afoul of federal law. (CR 303.) In August 2005, Plaintiffs filed a motion asking the court to impose sanctions if the State failed to enact legislation within 30 days to bring the State into compliance with the district court's orders. (CR 296.) The State Defendants opposed the sanctions motion and asked the district court for guidance regarding the extent to which the State could rely on federal funding to meet its obligations under the EEOA to rationally fund its chosen ELL instructional programs because the use of federal funds was the key dispute between the Governor and Legislature. (CR 303.)

The district court granted the sanctions motion on December 15, 2005 and gave the State until January 25, 2006 to pass legislation complying with the court's prior orders. (Int. Pet. App. 171a-172a.) If the deadline was not met, daily monetary fines would be imposed, on an escalating scale, until legislation was enacted. The district court declined to address the appropriate use of federal funds, expressing concern that to do so would be to issue an impermissible

advisory opinion. (*Id.* 167a-168a.) The State did not meet the January 25, 2006 deadline.[3]

II. Enactment of HB 2064.

On March 2, 2006, the Legislature passed HB 2064 to comply with the January 2000 judgment. (Int. Pet. App. 333a-334a). On March 3, 2006, the Governor issued a written statement of her intent to allow the bill to become law without her signature, again noting that the bill authorized the same use of federal funds that had motivated her prior veto. (CR 376.) HB 2064 remains the law controlling the funding and provision of ELL instruction in Arizona.

a. The Per-Student Funding Provisions of HB 2064.

Arizona funds the maintenance and operations budgets of its public schools through a combination of state aid and local property taxes. Pursuant to the Arizona Constitution's mandate of a "general and uniform" system of public education, Ariz. Const. art. XI, § 1(A), the funding system applies statewide, and the combination of state and local funding is

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[3] The State requested permission to distribute fine monies accumulated under the December 15, 2005 order to Arizona school districts for their use in educating ELL students, rather than paying them into the court, and the district court granted that request. (CR 395.) The fines were subsequently vacated by the Ninth Circuit and are not at issue in this petition.

"equalized" to ensure that the funding provided to a school district to educate its students is not limited by the district's property wealth. A.R.S. § 15-971.

The process for equalizing the funds available to a school district is based on the number of students actually enrolled in that district and "weighted" to take into consideration the varying costs associated with educating different students, including their grade level and the size and location of the school district. A.R.S. § 15-943 (calculating "base support level" based on weighted student count). The student count used to calculate maintenance and operations' funding available is also increased to account for additional costs associated with special student needs, including whether the student is an ELL. A.R.S. § 15-543(2)(b).

Consistent with the existing structure of Arizona's school finance system, the additional funding HB 2064 provided to educate ELLs was to be distributed on a per-student basis. The legislation did so through two mechanisms: an increase in the weight allocated to ELL students in calculating a school's base support level (the "Group B weight") and a supplemental funding stream based on additional costs in excess of the Group B weight amount (the "SEI Fund").[4]

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[4] HB 2064 also provides additional funding for certain purposes through a Compensatory Instruction Fund discussed below.

Specifically, HB 2064 increased the Group B weight for ELL students – the extra amount of funding a school district gets for each ELL student enrolled – from $365 to $444. A.R.S. § 15-756.01.[5] This increase, however, was made expressly contingent on an order from the district court in this litigation finding that HB 2064 "addresses the orders in the case" and, at least on an interim basis, "permit[s the] act to be fully implemented to determine whether the resulting ELL plans and available funding to implement the plans bear a rational relationship to the cost of implementing appropriate language acquisition programs." (Int. Pet. App. 333a-334a (HB 2064, 2006 Ariz. Sess. Laws ch. 4, § 15).) The district court has consistently found that HB 2064 violates federal law, and the increased Group B weight has therefore never taken effect.

The SEI Fund is a new mechanism created by HB 2064 and designed to supplement the Group B weight to the extent necessary to provide districts with State funding that is rationally related to the cost of whatever ELL instructional program it has chosen. To achieve this end, HB 2064 requires the creation of a task force to develop ELL instructional models, followed by submissions from individual school districts regarding the per-student incremental costs associated with adopting one of the approved

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[5] The entire text of HB 2064, as enacted, appears in the Appendix to the Intervenors' Petition at 268a-334a.

models. A.R.S. § 15-756.01. If the per-student cost of implementing the State-approved instructional model is more than the $365 or $444 per student provided through the Group B weight, then the school district may request additional monies from the SEI Fund. *Id.*

However, under HB 2064, the State does not actually fund the entire incremental ELL instructional cost that is unmet by the Group B weight if the school or district receives federal funds. The school or district must subtract from any request a per-student amount representing the funds received by that school or district under Titles I, II, and III of the Elementary and Secondary Education Act (ESEA), as well as federal impact aid provided to offset the presence of non-taxable lands in the school or district's tax base and desegregation funds raised through local tax revenues. A.R.S. § 15-756.01(I). Under this funding scheme, a school or district that receives federal funds will necessarily receive less in state aid than the full cost of implementing an approved ELL instructional model. In contrast, a school or district that receives no federal or desegregation funds will be eligible to receive state aid equaling the full cost of implementing an approved ELL instructional model.

b. The Compensatory Instruction Fund.

HB 2064 also establishes a compensatory instruction fund ("CIF") which schools may use only for

"programs *in addition to normal classroom instruction* that may include individual or small group instruction, extended day classes, summer school or intersession school." A.R.S. § 15-756.11(G) (emphasis added). The programs are "limited to improving the English proficiency of current English language learners and pupils who were English language learners and who have been reclassified as English proficient within the previous two years." *Id.* Appropriations to, and grants from, the CIF are discretionary. A.R.S. § 15-756.11.

c. The Two-Year Limit.

Group B weight monies, SEI funds, and Compensatory Instruction dollars are all available to ELLs for two years. HB 2064 cuts off both Group B weights and SEI funds for any student who remains classified as an ELL for more than two years: "Monies from the [SEI] Fund established by this section and monies for the ELL support level weight . . . [Group B weights] shall not be distributed for more than two fiscal years for the same pupil." A.R.S. § 15-756.04(C); *see also* A.R.S. § 15-943(2) (including same limitation in Group B weight statute); A.R.S. § 15-756.01(J) (prohibiting school districts from including in their SEI budget request the "incremental costs" of any student "who has been classified as an English language learner for more than two years").

ELLs can continue to receive Compensatory Instruction services so long as they are classified as

ELLs, as well as for two years after they are reclassified as English Proficient. A.R.S. § 15-756.11(G). However, Compensatory Instruction services are limited: HB 2064 specifically defines those services to exclude normal classroom instruction of the type ELLs presumably will receive during the first two years from the Group B weight and SEI funds.[6] *Id.*

III. The Rule 60(b)(5) Motions.

a. Motions to Consider HB 2064 and to Purge Contempt.

On March 3, 2006, the State advised the district court that HB 2064 passed into law without the Governor's signature and moved for accelerated consideration of that legislation so that any deficiencies identified by the court could be remedied during the still-ongoing legislative session. (CR 375, 376.)

On March 8, 2006, the Superintendent of Public Instruction[7] ("Superintendent") requested an evidentiary hearing "to demonstrate that the funding provision of the statute adequately provides for the needs of ELL students" in NUSD. (CR 380.) That same day,

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[6] ELLs who score at or above a designated score for English proficiency are to be reclassified as English Proficient. A.R.S. § 15-756.05(B). English Proficient students can receive Compensatory Instruction services only for two years after their reclassification. A.R.S. § 15-756.11(G).

[7] The Superintendent obtained separate representation in September 2005. (CR 316.)

the Speaker of the Arizona House of Representatives and the President of the Arizona Senate (the "Intervenors") moved to intervene, principally to "defend the plan for English Language Learners . . . adopted by the Arizona Legislature in H.B. 2064." (JA 56.) Attached to the motion to intervene was a proposed motion to "purge the State of Arizona of contempt" based on the passage of HB 2064, both in itself and when considered in conjunction with other reforms of Arizona education, including other sources of available funding. (JA 65.) The draft motion to purge contempt also contended that NCLB had preempted the EEOA and precluded federal court orders prescribing any relief other than compliance with the NCLB's regulatory process. (JA 73-77.)

The district court granted the motion to intervene and ordered expedited, simultaneous briefing by all parties regarding both HB 2064's adequacy as a response to the orders requiring compliance with the judgment and the Intervenors' motion to purge the State of contempt. (CR 381, 390.)

On the deadline to submit an opening brief regarding the adequacy of HB 2064, the Intervenors filed a revised version of their motion to purge the State of contempt. (CR 422.) This version still included the argument that HB 2064 complied with the court's prior orders and January 2000 judgment both on its own and when viewed in conjunction with other available funding. (*Id.*) It also added a new claim for relief, invoking Rule 60(b)(5) to move for relief from

the judgment based on both satisfaction of the judgment and preemption of the EEOA by NCLB.[8] (*Id.*)

The Superintendent filed a memorandum supporting HB 2064 as "meet[ing] the spirit of prior orders" and asked the district court to provisionally approve the bill and retain jurisdiction for a year to determine how it was working. (CR 414.) The Superintendent also joined the Intervenors' motion to purge contempt. (CR 433.)

The State filed a brief analyzing HB 2064 and its compliance with the court's prior orders. The State's brief identified three potential problems with the statutory scheme created by HB 2064:

> (1) by factoring available federal funding into its calculation of the amount of state aid to be provided to schools and districts through the SEI fund, it ran afoul of NCLB's prohibition on considering federal funds in determining the amount of state aid (20 U.S.C. § 7902);
>
> (2) by deducting federal funds from the amount of state aid distributed through the SEI fund, it also ran afoul of the Elementary and Secondary Education Act ("ESEA") prohibitions on using federal educational funds to supplant (rather

[8] Specifically, the Intervenors' Rule 60(b) motion sought relief from the January 2000 judgment and three orders setting deadlines for compliance with that judgment (CR 222, 290, and 335). (*Id.*)

than supplement) state funds (20 U.S.C. §§ 6314(a)(2)(B), 6315(b)(3), § 6613(f), 6623(b), 6825(g)); and

(3) by cutting off most ELL instructional funding after two years without providing an exception for students who still had not achieved language competence, it ran afoul of the EEOA itself.

(CR 415.) As the State noted in its brief, it raised the federal funding issues (on which it had previously sought the court's guidance) because the penalties for violating the NCLB and ESEA provisions could include denying future federal education funding to Arizona entirely, potentially affecting more than half a billion dollars per year in funding relied on by all of Arizona's students. *Id.*; *see also* 20 U.S.C. § 1234a-1234b, 1234d; *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 665 (1985).

With regard to the motion to purge contempt, the State disputed that Arizona was in contempt of any court order because it had passed HB 2064 in an attempt to comply with the court's judgment. (CR 416.) The State noted that, while it had raised concerns regarding the use of federal funds and the two-year cutoff of funding, even a finding that HB 2064 was inadequate to comply with the judgment would not put Arizona in contempt of court or automatically reinstate the fines imposed by the court's prior order. (*Id.*)

b. Initial Decision on HB 2064 and the Motion to Purge Contempt.

After briefing and argument, the district court concluded that HB 2064 did not comply with its prior orders and judgment because its two-year limitation and offset of federal funds violated federal law. (Int. Pet. App. 181a-186a.) The Ninth Circuit reversed the district court's decision in an unpublished memorandum disposition, holding that the district court should have conducted an evidentiary hearing on the Superintendent's and Intervenors' claims of changed factual circumstances sufficient to justify relief from the judgment under Rule 60(b)(5). (*Id.* 189a-190a.)

c. Proceedings After Remand.

At the conclusion of an evidentiary hearing on remand, the district court again held that the State Defendants had not yet complied with its prior orders and judgments, regardless of any improvements in ELL instruction in NUSD, because HB 2064 violates (1) the NCLB's prohibition on consideration of federal funds, (2) the ESEA's prohibition on using federal funds to supplant state aid to schools, and (3) the EEOA by categorically denying funds to support classroom instruction of any ELL student who has not achieved proficiency in two years. (Int. Pet. App. 113a-115a.) In a subsequent order, the district court suggested that the State was nearing compliance, noting that the problems with HB 2064 could be fixed

by removing the federal offsets and two-year limitation. (*Id.* 90a; JA 88-90.)

The Ninth Circuit affirmed. Applying the standards this Court articulated in *Agostini v. Felton*, 521 U.S. 203 (1997) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), it found that the district court did not abuse its discretion to modify the judgment because neither the underlying facts nor the governing law had changed sufficiently. (Int. Pet. App. 49a-50a, 59a-61a.) The Ninth Circuit examined the proffered changes of fact and law and found each insufficient to call for modification of the judgment. On the issues of fact, the Ninth Circuit concluded that the moving parties had failed to demonstrate either that the extra help needed by ELL students no longer costs extra money or that the per-student funding chosen by the Legislature as the means of meeting those costs was enough to do so, particularly in light of continued problems with student performance in the Nogales district. (*Id.* 63a-72a.) On the issues of law, the Ninth Circuit found that NCLB neither expressly nor impliedly preempted EEOA and that NCLB's monitoring of statewide improvement differed from the EEOA's guarantee that the State will provide to each ELL child the educational support necessary to overcome language barriers. (*Id.* 72a-81a.) The Ninth Circuit concluded that the district court correctly focused on HB 2064 and found that that legislation violated NCLB (by considering

federal funds) and the EEOA (by limiting most ELL funding to two years). (*Id.* 81a-90a.)[9]

d. Current Status of the Federal Funding Offsets and the Two-Year Limit.

As noted in his petition, the Superintendent is not enforcing the federal funding offsets or the two-year cap in HB 2064 because of the district court's injunctive order forbidding implementation of those provisions. (Superintendent's Reply in Support of Petition in No. 08-289 at 10-11 & n.7.) However, the Legislature has not amended Arizona's statutes to eliminate those requirements, which would once again be binding on the Superintendent and other State officials if the district court's injunctions in this case are vacated or otherwise lifted.

The United States Department of Education has formally warned the Superintendent that Arizona could face the loss of federal funds or be required to return previously received federal funds if it implements the offset provisions of HB 2064 as written.[10] (App. 1-4.)

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[9] The Ninth Circuit declined to reach the issue of HB 2064's violation of the restriction on supplanting, which it deemed unnecessary to its decision. (*Id.* at 88a-89a n.53.)

[10] The Department of Education's June 2008 letter was issued after the conclusion of the evidentiary proceedings on the Rule 60 motions held in the district court. It is subject to judicial notice under Fed. R. Evid. 201 and a copy has been included in the Appendix.

SUMMARY OF ARGUMENT

The position of the State with regard to the questions presented by the Petitions remains limited to those issues exposing Arizona to the potential loss of federal educational funds and to further litigation regarding compliance with federal law.

With regard to the proper standard for Rule 60(b) relief, under this Court's decisions, the current state of facts and law are necessarily relevant when determining whether to grant relief from a judgment under Rule 60(b)(5). Relief from a judgment is not appropriate if it would permit or perpetuate a violation of federal law. In this case, Arizona law, as amended by HB 2064, requires State officials to consider and deduct federal education funds when allocating State ELL funding to school districts. These setoffs would violate the NCLB and jeopardize more than half a billion dollars per year in federal educational funding provided for Arizona students. Arizona officials are not implementing these provisions because of the district court's injunction now in place, but the State would be required to fully implement them if the injunction is lifted as Petitioners request. Because of the flaws in HB 2064 the district court did not abuse its discretion in denying Rule 60(b) relief.

Nonetheless, the State does not agree with the Ninth Circuit's statements that federalism concerns are somehow limited in this case because Arizona's elected officials have disagreed regarding this important

legal issue. Concerns about minimizing judicial intrusions into State governance are always present when injunctive relief against State officials is at issue.

With regard to the relationship between EEOA and NCLB, the State disagrees with the Petitioners' contention that NCLB now sets the standard for compliance with the EEOA's "appropriate action" requirement. The NCLB, as a statute enacted under Congress' Spending Clause authority, is optional for States. Only if they choose to accept federal funding must the States follow its stringent and detailed requirements for educational programs. A finding that the NCLB was intended to set forth standards for complying with the EEOA would eliminate the choice Congress intended to provide by mandating NCLB compliance in even those States that have declined federal funding.

Moreover, Congress authorized private rights of action for EEOA violations, but did not do so for NCLB. Equating the two statutes would expose States to private suits alleging violations of NCLB, by importing the EEOA's private right of action into a statute that was written to contain no such right.

ARGUMENT

I. Current Law Must Be Considered in Ruling on a Motion for Relief from Judgment Under Rule 60.

The Petitioners' discussion of the standard applicable to a State officer's Rule 60 motion appropriately focuses on the flexibility with which federal courts must apply existing judgments to the changes in factual and legal circumstances that arise after entry of those judgments. Undue rigidity would both be unjust and intrude unnecessarily into the decisions entrusted to State officials. *See Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004); *Agostini*, 521 U.S. at 203; *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 247 (1991); *Rufo*, 502 U.S. at 385, 393 & n.14.

The Ninth Circuit incorrectly indicated that the State's positions in this case eliminated the federalism concerns that would otherwise be present in a case involving relief against State officers. As Petitioners rightly state, the disagreement among State officers in this case does not eliminate federalism concerns or alter the 60(b) analysis in any fashion. A Rule 60 request by any State actor raises the same federalism concerns as a Rule 60 motion joined by every State official. *Cf. Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976) (discussing federalism issues inherent in enjoining conduct of State officials); *Lewis v. Casey*, 518 U.S. 343, 385-87 (1996) (Thomas, J., concurring) (same); *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1402 (9th Cir. 1997) (injunction against State actors

requires scrutiny to ensure it is no broader than necessary to assure their compliance with federal law).

Moreover, the State did not "abandon its defense of the suit," "largely side[ ] with Flores," or "wish the injunction to remain in place" as the Ninth Circuit stated. (Int. Pet. App. 28a, 52a.) As set forth in some detail above, the State has consistently opposed efforts to hold the State Defendants in contempt, including in the most recent proceedings over HB 2064. *See supra* 5-8, 16. With regard to the Rule 60(b) issue, the State raised long-standing concerns about the permissible use of federal funds when establishing a State system for funding ELL programs. (CR 415, 416.) All Defendants had requested that the district court address this important issue, recognizing that its resolution was necessary to protect the substantial federal funding provided to Arizona's schools. (CR 303; *see also* 380, 414, 415, 422 (requesting evaluation of HB 2064 as sufficient to comply with the judgment).)

The State and the Petitioners disagree, however, on the role of current state law in a Rule 60 analysis. Indeed, in *Rufo*, this Court made clear that modification of a decree under Rule 60(b) is not permitted if the modification itself would permit unlawful conduct. *Rufo*, 502 U.S. at 391 ("modification must not create or perpetuate a constitutional violation"); *see also Bd. of Educ. of Okla. City*, 498 U.S. at 250 (court should examine then-current student assignment plan in considering dissolution of injunction). And,

nothing in this Court's Rule 60 jurisprudence suggests that allegations of changed circumstances supporting relief from a judgment are to be examined without considering their entire context. In a case involving the adequacy of State educational programs, the context must necessarily include an analysis of the current state law governing those programs. Where, as here, current state law raises issues of possible violation of federal statutes, that law must be considered fully before a grant of relief under Rule 60 could be appropriate.

For that reason, the lower courts appropriately considered whether the two-year cap on most ELL funding violated the EEOA. (Int. Pet. App. 81a-86a, 114a-115a, 185a-186a.) In addition, they appropriately considered whether the setoffs based on federal education funding required by HB 2064 violated 20 U.S.C. § 7902's prohibition against considering federal funds and the anti-supplanting provisions of the ESEA. (*Id.* 86a-88a, 113a-114a, 181a-185a.)

II. Compliance with NCLB Is Not Equivalent to Compliance with the EEOA.

Both the NCLB and the EEOA address the instruction of ELLs, but they advance the instruction of those students through different means. NCLB conditions the receipt of federal monies on monitoring the aggregate progress of students and fulfilling self-imposed requirements for progress of those students. 20 U.S.C. § 6842(a)(3)(A) (requiring school to make

annual increases in the percentage of children progressing toward English proficiency). If progress is not made, the remedy is greater supervision, including the preparation of an improvement plan, technical help from the State, and the prospect of a State overhaul of curriculum or personnel if adequate progress is not made for four years in a row. 20 U.S.C. § 6842(b). In contrast, the EEOA requires assistance for all ELLs so that they can overcome language barriers. 20 U.S.C. § 1703(f). While NCLB monitors the gradual progress of some percentage of ELLs, the EEOA ensures "appropriate action" for all ELL students and provides a private right of action to enforce its mandate.

Congress did not amend EEOA when it enacted the NCLB, and nothing in the language of the NCLB suggests that Congress intended its provisions to define "appropriate action" under the EEOA. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) (where statutes can co-exist, each remains effective absent "clearly expressed congressional intention to the contrary"). To the contrary, the NCLB provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. The language of the two acts does not support Petitioners' contention that compliance with the procedural requirements of the NCLB now defines "appropriate action" under the EEOA.

Moreover, NCLB is a wholly voluntary program, consistent with the limited nature of Congress'

Spending Clause authority. *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (Congress' authority to impose conditions in exchange for providing federal funding is conditioned on States' voluntary and knowing acceptance of those conditions). NCLB's extensive and specific requirements, set forth accurately and in considerable detail by the Petitioners, can be imposed only on those States and local school districts that choose to accept federal educational funding. *See* 20 U.S.C. § 7907(a) ("[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act"). If compliance with NCLB's requirements for monitoring and incremental improvement of ELL instructional programs is construed as the new congressional benchmark for EEOA compliance, then the choice Congress provided to States in enacting NCLB will be rendered illusory. If every State will have to comply with Title III of NCLB in order to comply with the EEOA, then NCLB's mandate will apply to even those States that may choose to forego federal funding.

NCLB should not be so construed. The EEOA imposes only the limited requirement that each State choose and implement an educational program that assists ELLs in overcoming language barriers. 20 U.S.C. § 1703(f). As explained by the Fifth Circuit, that requirement means only that a State and school

district must take measures "reasonably calculated" to implement the chosen educational program and to achieve the desired outcome of student language acquisition to permit academic performance. *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981) (setting forth a three-part standard for EEOA compliance that defers to the policy judgments of State and local officials). As the Petitioners correctly maintain, compliance with the EEOA does not require adoption of any particular program of either substantive education or state oversight (including that of the NLCB), nor does it require any particular method of implementing the chosen program.[11]

Petitioners' theory also invites additional private litigation against States regarding their efforts to comply with NCLB. The EEOA creates a private right of action for parties with standing to assert a State's failure to take "appropriate action." 20 U.S.C. § 1706. NLCB, in contrast, establishes no private right of action, providing instead for an exclusive federal and State administrative enforcement process. *See, e.g., Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 214 (3d Cir. 2008); *Alliance for Children, Inc. v. City of Detroit Pub. Sch.*, 475 F. Supp. 2d 655, 662-63 (E.D. Mich. 2007); *Ass'n of Cmty. Orgs. for Reform Now v. N.Y. City Dep't of Educ.*, 269 F. Supp. 2d 338,

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[11] Of course, the data about student performance generated by NCLB and the programs put in place to meet its performance standards will certainly be relevant to EEOA litigation in any state that chooses to accept federal educational funding.

347 (S.D.N.Y. 2003). Using NCLB to determine whether a State complies with the EEOA undermines the distinct enforcement procedures that Congress established. Petitioners' theory would permit litigants to use the EEOA's private right of action to bring suits alleging that a State failed to take "appropriate action" because it did not comply with monitoring requirements established under NCLB or reach the NCLB's particular targets for student achievement in a given year. This scenario contravenes Congress's decision not to provide a private cause of action to enforce NCLB.

Under an appropriate reading of these two related, separate statutes, Arizona will remain free to accept or reject federal funding and the accompanying mandates of NCLB, as well as to implement the NCLB without fear of private suit to enforce any NCLB requirement. Under the EEOA, Arizona also retains the authority to change its chosen method and philosophy of ELL instruction or the way in which it funds that instruction, so long as the resulting program is reasonably likely to result in ELL students overcoming the language barriers they face.

CONCLUSION

Arizona's compliance with the EEOA must be judged by the law currently governing its instructional programs for ELL students and whether those programs are reasonably calculated to assist students in overcoming language barriers. When determining whether to grant Petitioners' motions for relief under Rule 60(b)(5), the lower courts correctly considered whether Arizona could deduct the amount of federal funds a school or school district may receive from the calculation of state assistance for ELL programs and whether a two-year limit on most ELL funding complies with the EEOA. It also correctly rejected the theory that the NCLB now defines "appropriate action" under the EEOA. For these reasons, the Ninth Circuit did not err in affirming the district court's decision to deny relief under Rule 60(b)(5) at this time.

Respectfully submitted,

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[LOGO]

THE ASSISTANT SECRETARY

June 6, 2008

The Honorable Tom Horne
Superintendent of Public Instruction
Arizona Department of Education
1535 West Jefferson Street
Phoenix, Arizona 85007

Dear Superintendent Horne:

Over the past several months, we received a few inquiries concerning budget requests that the Arizona Department of Education (ADE) required its school districts to submit in February to implement Structured English Immersion (SEI) models required by Arizona State law (A.R.S. § 15-756.02A). We also learned that the Arizona legislature appropriated more than $40,000,000 to fund SEI models in the 2008-09 school year.

We understand that, under Arizona law (A.R.S. § 15-756.01(I)(1)-(3)), the allocation of State funds to a district to implement SEI models must be reduced by the amount of funds the district receives for its English language learner (ELL) population under the following four Elementary and Secondary Education

Act (ESEA) programs: Title I (improving the academic achievement of the disadvantaged), Title II-A (preparing, training, and recruiting high-quality teachers and principals), Title III (language instruction for limited English proficient and immigrant students), and Title VIII (Impact Aid program).

This letter is to remind Arizona that any requirement or plan to offset district allocations of State funds, based on the amount of Federal funds districts receive, would be inconsistent with several provisions of the ESEA.

First, section 9522 of the ESEA specifically prohibits a State from taking into consideration payments under any ESEA program (with the exception of Impact Aid) in determining the amount of State aid a school district can receive for the free public education of its children. As a result, ADE may not reduce the amount of State funds that a district would receive to implement SEI for ELL students under A.R.S. § 15-756.04(A) by the amount of funds that district receives, on the basis of its population of ELL students, under Titles I, II-A, and III of the ESEA.

Second, although Impact Aid is not covered by section 9522, the Impact Aid statute itself specifically prohibits a State, such as Arizona, that does not have in effect a program of State aid certified by the Secretary to equalize expenditures among school districts from considering Impact Aid payments in determining the amount of State aid to a school district for free public education. *See* 20 U.S.C. 7709(a)-(b).

Finally, Title I (20 U.S.C. 6321(b)), Title II-A (20 U.S.C. 6623(b)), and Title III (20 U.S.C. 6825(g)) of the ESEA contain supplement, not supplant provisions that prohibit the use of funds under each of those programs to supplant State funds that would have been made available in the absence of those Federal funds. Reducing the amount of State funds a district would receive to implement SEI models by the amount of funds a district received for its ELL population under its Title I, Title II, and Title III grants would violate the non-supplanting provisions of these programs because, in the absence of these Federal funds, the district would have received and expended more State funds to serve ELL students.

The Department would like to confirm that ADE intends to allocate State funds to implement SEI models without regard to the ESEA funds that districts in the State receive and in a manner that does not violate the ESEA provisions outlined above. If you have any questions or wish to follow up by phone, please do not hesitate to contact Dr. Zollie Stevenson (202-260-1824) of my staff to set up an appointment for us to discuss this issue further.

Thank you for your attention to this matter.

Sincerely,

/s/ Kerri Briggs
Kerri L. Briggs, Ph.D.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.